IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

NO. 506

MAY S. TONKIN and PEOPLES-PITTSBURGH TRUST COMPANY, Executors of the Estate of John B. Tonkin, Petitioners,

v.

THE UNITED STATES, Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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OPINIONS.

The opinion of the District Court of the United States for the Western District of Pennsylvania, under which judgment was entered for petitioners in the amount of $45,930.95, is reported in 56 F. Supp. 817. The opinion of the Circuit Court of Appeals is reported in 150 F. (2d) 531.

JURISDICTION.

Jurisdiction is invoked under Section 240 of the Judicial Code as amended and more particularly because an important question of federal law is involved which has not been, and should be, settled by this court.

STATEMENT OF THE CASE.

During 41 years of employment with Standard Oil Company of New Jersey interests, John B. Tonkin had acquired more than 10,000 shares of the stock of that corporation. He had discussed the lack of diversification in his holdings with his brother, Loring Tonkin, and with banking and insurance men. As a result of these discussions he purchased five annuity contracts from various insurance companies for $75,415 from which he received $6217.48 annually. (R 10 a)

At about the same time Tonkin created a trust at the Peoples-Pittsburgh Trust Company under the terms of which he transferred the following assets to the trustee: (R 5 a, 27 a, 35 a)

(1) 2204 shares of Standard Oil Company stock;

(2) Three policies of life insurance aggregating $36,300 (these policies were taken out many years before by the settlor and were transferred to the trustee without retaining any incidents of ownership);

(3) Six policies of insurance aggregating $40,000 (the settlor retained control over these policies and the executors included them in his gross estate; they are therefore not involved in this proceeding).

Under the terms of the trust agreement his wife was the principal beneficiary, the other beneficiaries being his brothers and sisters and their children. The trust agreement contained no provision for a reverter of any of the assets to the settlor under any circumstances. (R 31 a)

By the terms of the trust Mrs. Tonkin, who was the principal beneficiary, could ask the trustee to purchase

either ordinary or single premium life insurance policies. Shortly after the creation of the trust, she instructed the trustee to purchase single premium life insurance policies. The trustee thereupon sold the 2204 shares of Standard Oil stock and purchased single premium life insurance policies having a face value of $200,000. (R 30 a, 6 a)

Under the terms of the trust the trustee was not required to retain these policies but could in its discretion surrender them and invest the proceeds in other investments. (R 30 a)

In 1937 Tonkin was past the age for retirement from the Peoples Natural Gas Company of which he was president and decided to retire. At the time of his retirement he was, according to Dr. McMurray, his family physician, in excellent health. He had plans for travelling and enjoying a long life. He often said that he would outlive his father, who died at the age of 92. (R 53 a) After his retirement, Tonkin built a new house at Madison, Ohio and opened a new office in Pittsburgh for the transaction of such business as he might have. He continued to be director of a number of banking and charitable organizations. (R 45 a)

While in Florida in the winter of 1940 he contracted pneumonia and died. (R 54 a)

The Commissioner determined the estate tax liability by including $238,803.76 in the gross estate of the decedent made up of

(1) $200,042.98, the proceeds of the five single premium policies.

(2) $36,920.52, the proceeds of three life insurance policies irrevocably assigned to the trustee.

(3) $1,840.26, the uninvested cash in the trust at decedent's death. (R 12 a)

Tonkin's executors paid the tax on these items under protest and filed the present suit. The case was heard by Judge Robert M. Gibson in the District Court for the Western District of Pennsylvania and resulted in a judgment for the plaintiffs in the amount of $45,930.95 with interest. (R 59 a) On appeal by the government judgment was reversed by the Circuit Court of Appeals.

SPECIFICATION OF ERRORS.

1. The Circuit Court erred in concluding that an unintentional and involuntary reverter which might be occasioned by the death of all the designated beneficiaries of a trust was the equivalent of a reverter expressly reserved by the settlor and consequently made the transfer of the trust assets taxable.

2. The Circuit Court erred in reversing a finding of the trial court that a transfer was not made in contemplation of death, which finding was not challenged by the government and not presented to the Circuit Court for consideration.

3. The Circuit Court erred in concluding that the purchase of annuities by Tonkin and the complete and final transfer of stock to the trustee constituted an indivisible transaction which made *all* of the assets of the trust taxable.

SUMMARY OF ARGUMENT.

The trust created by Tonkin in 1936 contained no provisions for any reversionary interest to him under any circumstances. In the Goldstone case the insured specifically provided for the reversion to him of rights under the annuity and single premium contracts if his wife should predecease him. The Goldstone case was not intended to apply to a case where the settlor retained no string and where the only reverter that is possible is one by operation of law in the event that all of the beneficiaries named in the trust died before the settlor.

The position taken by the government at the trial of this case, that the trust was created by Tonkin in contemplation of death, was abandoned by it on appeal. The Circuit Court was therefore not warranted in reversing the findings of the lower court and concluding that the gift was made in contemplation of death.

The purchase of annuities by Tonkin was, as the District Court found, a separate and independent transaction. The transfer of 2204 shares of Standard Oil stock to the trustee was complete and final. The action of Mrs. Tonkin and the trustee in selling the stock and purchasing single premium policies was voluntary and for Mrs. Tonkin's benefit. It was of no concern to Tonkin whether single premium policies were purchased or not. Even if they were purchased the trustee could change the investment later.

The proceeds of the single premium policies were therefore not taxable as a transfer intended to take effect in possession or enjoyment at or after death.

The opinion of the Circuit Court does not dispose of the proceeds of the ordinary life policies amounting to $36,920.52 and the cash in the trust amounting to $1840.26.

Certiorari should be granted to determine whether the Goldstone case applies to all trusts in which the beneficiaries are mortal and to determine the taxability of the two items which are not covered by the Circuit Court's opinion.

ARGUMENT.

The position of the government in the trial court was that the following three items

(1) $200,042.98, the proceeds of five single premium life insurance policies purchased by the trustee after the creation of the trust
(2) $36,920.52, the proceeds of three ordinary life insurance policies purchased by the settlor many years before and
(3) $1840.26, cash in the trust,

were includible in decedent's gross estate, because,

(1) The transfer of all the assets by the settlor to the trustee was made in contemplation of death and therefore all three items were taxable,

(2) The transfer by the settlor of 2204 shares of stock to the trustee was intended to take effect in possession or enjoyment at or after death and therefore the first item, to-wit, $200,042.98, the proceeds of the single premium policies purchased by the trustee was includible in decedent's gross estate. This ground con-

cedes that items (2) and (3) are *not* taxable and a refund is proper.

On appeal the government abandoned the first ground and limited its appeal and its argument to the proposition that the item of $200,042.98 was includible in decedent's gross estate as a transfer intended to take effect in possession or enjoyment at or after death. (See government's brief in Circuit Court, page 7).

On appeal the government also injected a new argument into the case, namely, the taxability of all three assets, because of a possibility of reverter, if all of the beneficiaries named in the trust died. The Circuit Court of Appeals reversed the judgment entered by the lower court on the ground that the case was controlled by the decision in the Goldstone case. The reasons given by Judge Martin were that the transfer was made in contemplation of death and there was a possibility of reverter of all of the assets to the settlor.

A.

The Decedent Retained No Reversionary Interest in the Trust.

The novel question in this case is whether a transfer to a trustee is taxable where there are no provisions in the trust for any kind of reversion to the settlor, but where the beneficiaries are all mortal and may die before the settlor, so that the assets might, by operation of law, revert to the settlor.

The Circuit Court held that such a reverter by operation of law came within the purview of the Goldstone case and made all the trust assets taxable.

The Goldstone case involved the purchase by the decedent of two contracts—one, a single premium life insurance policy; the other, an annuity. The decedent gave to his wife the unrestricted rights under both contracts, but he provided that if she died before he did, those rights reverted to him. This court held that the decedent retained "possession of a reversionary interest" in the proceeds of both contracts, and the proceeds were therefore includible in the gross estate of the decedent under Section 302(c) as a transfer "intended to take effect in possession or enjoyment at or after death." It was specifically said in the Goldstone case:

> "The essential element in this case, therefore, is the decedent's possession of a reversionary interest at the time of his death, delaying until then the determination of the ultimate possession or enjoyment of the property."

Does the Goldstone case control a case where the settlor attached no strings to the property which he transferred? There is no provision in the deed of trust created by Tonkin by which he retained any interest or control over the property.

It is true that in his trust, as in all other trusts, where the beneficiaries are mortal and may die before the settlor—the assets would not escheat, but would ultimately return to the estate of the settlor. But such a remote possibility of reverter by operation of law has never been considered either by this court or by any other court as making a gift taxable. Indeed Judge Biggs of the Third Circuit ably expressed the prevailing view that a possibility of reverter, which arbitrarily attaches to every trust in whch the beneficiaries are mortal, does not make a gift, a transfer to take effect at or after death: *Com. v. Kellogg,* 119 F. 2d 54 (C.C.A.

3, 1941); *Lloyd's Estate v. Commissioner,* 141 F. 2d 758 (C.C.A. 3, 1944).

It has been unequivocally stated on many occasions that there is no possibility of reverter unless "a string or tie was inserted in the trust indenture whereby the grantor might pull back the corpus to himself upon the happening of some contingency terminable only by his death": *Com. v. Kellogg,* 119 F. 2d 54 (C.C.A. 3, 1941).

At the time of the oral argument in the instant case it was stated in reply to a question put by Judge Biggs that 29 people would have to die, before Tonkin died, to create the situation in which there would be a reverter. A complete failure of an entire family line resulting in the reversion of assets to the settlor by operation of law is not a string or tie which the settlor attached to the gift. It would be a reversion in spite of everything the settlor did to relinquish all interest in the gift.

Indeed, only a few weeks before the decision in the instant case, the Third Circuit Court carefully distinguished between a transfer in which the settlor reserved a "positive power" and a transfer where the reversion was merely "passive" by the operation of law: *Eldredge v. Rothensies,* 150 F. 2d 23 (1945).

If Judge Martin is correct in holding that there is no difference between a gift in which the settlor retained a string and a gift in which he retained no string, then every trust that does not have a corporate beneficiary would become taxable under Section 302(c) as a transfer intended to take effect in possession or enjoyment at or after death. Such a conclusion extends the provisions of the taxing statute for beyond its obvious scope. It, furthermore, makes it impossible for any gift to be made, no matter how irrevocable or final

in which a man designates his family and next of kin as beneficiaries, without subjecting it to the federal estate tax.

There is another error in Judge Martin's opinion. He does not say that this possibility of reverter by operation of law results in making the trust a transfer to take effect in possession or enjoyment at or after death. He says that this possibility of reverter results in a transfer *in contemplation of death.*

This conclusion does not follow from the premises nor from anything that was said in the Goldstone case by this court.

The instant case is entirely different from the Goldstone case. The only similarity is in the fact that there were annuities and single premium policies involved in both cases. But this surface similarity should not be permitted to blur out the fundamental difference under the taxing statute. Did Tonkin's death act as an operating factor or generating source giving rights to any beneficiaries? It obviously did not. In 1936 when the trust was created all the rights of the beneficiaries were forever fixed and certain. Nothing that Tonkin had done or might do could change any rights of the beneficiaries or bring the corpus or the income back to him. There was no shifting in possession or enjoyment at Tonkin's death.

Under these circumstances we do not think that the Goldstone case is controlling. It was decided five days after the arguments in the instant case and neither of the parties had any opportunity to comment on the differences in the two cases. This court should, therefore, grant certiorari so that the novel question as to the taxability of all irrevocable trusts in which the beneficiaries are mortal may be determined by this court.

B.

The Question Whether the Transfers Were Made in Contemplation of Death Was Not Before the Circuit Court.

The opinion of the Circuit Court says:

"* * * the conclusion seems inescapable that the purchase of the single premium life insurance policies and the annuity contracts procured by Tonkin was an indivisible transaction, made in contemplation of death within the meaning of the pertinent section of the Revenue Act. The ultimate distribution of the proceeds of the contracts was suspended until the moment of Tonkin's death." (R. 71)

It is obvious from these two sentences that the court has confused the "contemplation of death theory" and the "taking effect in possession theory." The "contemplation of death theory" was not before the Circuit Court. Indeed no serious effort was ever made by the government to show that the entire trust was made in contemplation of death. On appeal the government definitely abandoned this theory. The briefs of both sides in the Circuit Court make no reference to it, nor does it appear in the "Questions Presented" on page 3 of the government's brief, nor in the "Statement of Points to be Urged" on page 12 of its brief, nor in the "Summary of the Government's Argument" on page 14.

On page 7 of its brief the government specifically says:

"This appeal pertains to the includibility of the proceeds of $200,042.98 of the five single premium policies of insurance in the decedent's gross estate."

Thus the government abandoned the theory that

the *entire* trust was made in contemplation of death and limited its appeal to the position that the proceeds of the five single premium life insurance policies were part of an indivisible transaction with the annuities purchased by Tonkin, so as to constitute a transfer intended to take effect in possession or enjoyment at or after death.

The Circuit Court was not warranted in setting aside findings which the trial court made—findings which were so overwhelmingly supported by the evidence, that the government concluded not to challenge them: *Dobson v. Commissioner,* 320 U. S. 489 (1943); *Oliver v. Bell,* 103 F. 2d 760 (C.C.A. 3, 1939); *Colorado Nat'l Bank v. Com.,* 305 U. S. 23 (1938); *McCaughn v. Real Estate Land Title & Trust Co.,* 297 U. S. 606 (1936).

Whether or not the transfer was made in contemplation of death is an inquiry into the dominant purpose or motives of the settlor in making a transfer. The answer to this question of fact was given by the trial court and was not before the Circuit Court. It is probable that the statement in the opinion that the trust was created in contemplation of death was an inadvertence and that the court intended to say that the purchase of annuities by Tonkin and of single premium life insurance policies by the trustee constituted an indivisible transaction making the transfer one intended to take effect in possession or enjoyment at or after death. But if this is what the court meant, then only the proceeds of the five single premium life insurance policies, to-wit, $200,042.98 are involved and the other two items $36,902.52 and $1840.26 would not be affected. They

would not become taxable and a refund on these two amounts would be due the petitioners.

C.

The Transfer of 2204 Shares of Standard Oil Stock Was Not a Transfer Intended to Take Effect in Possession or Enjoyment at or After Death.

The fundamental question in this case is really whether the transfer of the 2204 shares of Standard Oil stock to the trustee, the subsequent instructions by Mrs. Tonkin to purchase single premium life insurance policies, and the purchase of such policies by the trustee on the one hand and the purchase by Tonkin of annuities on the other constituted such an indivisible transaction as to constitute a transfer intended to take effect in possession or enjoyment at or after death.

The lower court found that the purchase of annuities by Tonkin was a single, independent and separate transaction by which Tonkin gained tax advantages, both federal and state, and diversification in his holdings. The purchase of annuities by Tonkin did not require the trustee or Mrs. Tonkin to do anything. Tonkin's purchases were complete and final in themselves.

True, they made it possible for the trustee to purchase single premium life insurance policies, if Mrs. Tonkin wished it. The lower court found as a fact that Mrs. Tonkin acted freely and independently, and there was no evidence that she was advised or coerced by her husband in the decision that she made. In *Dobson v. Com.*, 320 U. S. 489 (1943) this court said, page 502:

> "Whether an apparently integrated transaction shall be broken up into several separate steps and whether what apparently are several steps shall be synthesized into one whole transaction is frequently a necessary determination in deciding tax consequences. Where no statute or regulation controls, the tax court's selection of the course to follow is no more reviewable than any other question of fact."

In the absence of any evidence that there was a plan or arrangement between Tonkin, Mrs. Tonkin and the trustee (and the lower court found none), it is difficult to see how the transactions in this case come within any of the provisions of the taxing statute. There is no inference from the fact that a man and woman are married, that one is necessarily under the control of the other: *Estate of Edw. Lathrop Ballard,* 47 B.T.A. 784 (1942), affirmed by the Circuit Court of Appeals of the 2nd Circuit in 138 F. 2d 512 (1943). This case therefore presents a different situation from that in *Helvering v. Le Gierse,* 312 U. S. 531 (1931) and the *Goldstone Case,* 65 Supreme Court 1323 (1945), where the purchases of annuities and single premium policies were made by the decedent.

Section 302(c) provides that property shall be includible in the decedent's gross estate to the extent of any interest of which the decedent has made a transfer to take effect in possession or enjoyment at or after his death or of which he has at any time made a transfer by trust or otherwise under which he has retained for his life the possession or enjoyment of or the right to the income from the property. (p. 17)

How can it be argued that Tonkin retained the possession or enjoyment or the right to the income from the 2204 shares of Standard Oil stock which he transferred to the trustee? He retained nothing from these assets. He received no income from these assets; he had no string attached to these assets; he had forever irrevocably parted with all interest and control in them and left it to his wife and his trustee to determine what they wished to do with them.

Even after the single premium life insurance policies were purchased, the trustee could, under the terms of the trust agreement, have surrendered the policies and made other investments. The situation with which the court is confronted here is therefore different from any other case heretofore decided. The case coming closest in its facts to the instant case is the *Estate of Charles R. Dundore,* decided by the Board of Tax Appeals January 16, 1942, Docket 103899 Memorandum Opinion C.C.H. December, 12244B. There the decedent's wife purchased the single premium life insurance policies on decedent's life with money which the decedent had given her. Previously decedent had applied to the insurance company for an annuity contract. The Board held that the transfer to the wife of the money necessary to purchase the single premium policies was a complete gift without obligation on her part, and that therefore the contention that the gift was intended to take effect in possession or enjoyment at or after death had no basis.

Another case exactly like the case at bar is *Dickson v. Smith,* decided on August 18, 1945 by the District Court of the United States for the Southern District of Indiana (C.C.H. Inheritance, Estate and Gift Tax Serv-

ice, paragraph 10226, page 8271). There the decedent purchased annuities. He gave each of his three children some Inland Steel stock which they sold and, with the proceeds, purchased single premium life insurance policies on the life of their father. The court held that the transfer of the stock to the children "constituted final, complete and absolute gifts to them and there was no understanding or agreement that the children would be required to use the proceeds of the gift in any specified manner." The court concluded that the transfers of stock were not made in contemplation of death or to take effect in possession or enjoyment at or after death.

The transfer by Tonkin of 2204 shares of Standard Oil Company stock to the trustee was a complete and final gift.

We submit, therefore, that the petition for certiorari be granted to review the decision of the Circuit Court of Appeals.

Respectfully submitted,

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ELLA GRAUBART,
Attorneys for Petitioners.

APPENDIX.

The Appropriate Sections of the Revenue Act.

Section 302(c) of the Revenue Act of 1926 provided in part:

> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated— * * *
>
> "To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death * * *."

The joint resolution of Congress of March 3, 1931, U.S.C.A. Internal Revenue Code, Sect. 811c read (C.C.H. Federal Estate Tax, Sec. 3415)

> "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (c) of Section 302 of the Revenue Act of 1926 is amended to read as follows:
>
> "'(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom * * *.'"

The Revenue Act of 1932, 26 U.S.C.A. Internal Revenue Code, Sect. 811c reads: (C.C.H. Federal Estate Tax, Sec. 3416)

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * * *

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom. * * *."

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 506

MAY S. TONKIN AND PEOPLES-PITTSBURGH TRUST COMPANY, EXECUTORS OF THE ESTATE OF JOHN B. TONKIN, DECEASED, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 44a–58a) is reported in 56 F. Supp. 817. The opinion of the Circuit Court of Appeals (R. 64–71) is reported in 150 F. 2d 531.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 3, 1945. (R. 72.) Rehearing was denied on August 2, 1945. (R. 84.) Petition for a writ of certiorari was filed on October 12, 1945. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a transfer in trust was intended to take effect in possession or enjoyment at or after the settlor's death under Section 811 (c) of the Internal Revenue Code where the grantor retained the income from an annuity for life plus a reversionary interest by operation of law in the entire corpus.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and regulations are printed in the Appendix, *infra,* pp. 10–11.

STATEMENT

The facts were in part stipulated (R. 4a–14a) and in part found by the District Court (R. 44a–51a) as follows:

The taxpayer is the estate of John B. Tonkin, a resident of Pittsburgh, Pennsylvania, who died testate on January 26, 1940. He left no children. His widow, two sisters, two brothers and a half-brother survived him. (R. 4a.)

By irrevocable deed of trust dated December 3, 1936, Tonkin transferred to a corporate trustee (1) 2,204 shares of Standard Oil Company of New Jersey stock, (2) three life insurance policies aggregating $36,300 and (3) other insurance policies—not here at issue—over which he retained

control, aggregating $40,000. (R. 4a–5a, 8a, 11a.)

Seven days later, on December 10, 1936, Tonkin executed his last will and testament to which a codicil was added on February 2, 1937. (R. 5a.)

The trust instrument (Ex. A, R. 27a–39a) instructed the trustee to invest in insurance policies if directed to do so by the settlor's wife, and in particular ordered the trustee to purchase single premium insurance upon the settlor's life if she directed it. The trust empowered the trustee to exercise any rights thereunder. The trustee was also empowered to exercise all rights under the policies which were transferred. Six days after the execution of the deed of trust, Mrs. Tonkin, by letter dated December 9, 1936 (Ex. F, R. 40a–41a), directed the trustee to purchase single premium life insurance policies, using the proceeds of the sale of *all* the Standard Oil stock. Pursuant thereto the trustee purchased five such policies. (R. 6a.) No medical examination or evidence of insurability was required. (R. 9a.)

At the same time the trustee purchased the single premium life insurance contracts, the settlor purchased non-refundable single premium life annuity contracts. (R. 8a–9a.)

The life insurance policies would not have been issued unless at the same time there were also purchased the single premium non-refundable life annuity contracts. (R. 9a.)

The trust provided that the income therefrom should be paid to decedent's wife during their joint lives. In the event the wife predeceased him then during the remainder of decedent's life the income was payable to his sisters and brothers, or their issue. After decedent's death the trustee was to pay to the wife an annuity of $9,000, or the full net income of the trust if it exceeded that amount. (R. 31a–32a.)

Upon the death of the survivor of the decedent and his wife the principal was to be divided into six equal parts, four of which were to be paid over to decedent's brothers and sisters or their issue, the survivors to take the portions of any deceased brothers and sisters. Two of the six equal parts were to be retained in trust and the income therefrom to be paid to two of the decedent's brothers. Upon their death, or if either predeceased the decedent, their share was to fall to the other brothers and sisters, or their issue. (R. 32a–33a.)

A gift tax return for the calendar year 1936 was filed by the decedent who reported therein the value of the 2,204 shares of Standard Oil stock and the value of an insurance policy not here in issue. (R. 11a.)

An estate tax return was filed for the decedent's estate. No part of the proceeds of the single premium life policies, the three life poli-

cies aggregating $36,300 (face value), or the cash in the trust fund was included in the taxable gross estate. (R. 10a–11a.) The Commissioner of Internal Revenue ruled that these items were to be included in the gross estate and assessed a deficiency of $44,282.37, plus interest, which was paid by petitioners. (R. 11a–12a.) Their claims for refund were rejected by the Commissioner. (R. 13a–14a.)

The District Court found that contemplation of death was not an impelling motive for the gifts made in 1936; that Mrs. Tonkin in instructing the trustee to purchase the life policies acted voluntarily; that the impelling motive of the decedent in purchasing the annuities was not to enable the trustee to purchase the life policies; that the annuities purchased by the decedent were complete transactions in themselves. It concluded that the transfers were not to take effect at or after death. (R. 47a–49a.) Judgment was entered for the taxpayers. (R. 59a.) The Circuit Court of Appeals reversed.

ARGUMENT

This case presents no conflict of decisions. It was correctly decided below and calls for no further review.

The decision of the Circuit Court of Appeals is in accord with the principles enunciated by this Court in *Fidelity Co.* v. *Rothensies,* 324 U. S.

108; *Commissioner* v. *Estate of Field,* 324 U. S. 113, and *Goldstone* v. *United States,* decided by this Court on June 11, 1945, No. 699, 1944 Term, which applied the doctrine of *Helvering* v. *Hallock,* 309 U. S. 106.

I

The foregoing cases clearly support the view that trust assets are to be included within a decedent's gross estate under Section 811 (c) of the Internal Revenue Code (Appendix, *infra*) whenever there has been reserved to the settlor a reversionary interest which delays, until his death, "the determination of the ultimate possession or enjoyment of the property. The existence of such an interest constitutes an important incident of ownership sufficient by itself to support the imposition of the estate tax." *Goldstone* v. *United States, supra.* Neither the remoteness of that interest nor the improbability of its returning the corpus to the settlor in any way affects the significance of its *existence.*

But petitioners—not denying the existence of the reversionary interest—urge that it was not expressly reserved by the settlor in the trust instrument but rather results merely by operation of law. It is thus sought to attach importance to the manner by which the settlor retains his "string". This Court has only too often rejected such "legal niceties" which abound in real prop-

erty law. The conveyancer's subtle silence, no less than his artful terminology, ought not to permit the shedding of the tax burden.

The reasoning of the foregoing cases would indicate that so long as the possession and enjoyment of the ultimate remaindermen are actually held in suspense until at or after the grantor's death, the particular device employed is of no consequence. Cf. *Estate of Leaman* v. *Commissioner*, 5 T. C. No. 84.

The applicable regulations (Section 81.17 of Treasury Regulations 105, Appendix, *infra*) clearly reject as immaterial the distinction for which petitioners contend. It is there explicitly stated that "it is immaterial whether the decedent's interest arose by implication of law or by the express terms of the instrument of transfer".

II

In view of the foregoing it is not necessary to consider petitioners' objection to the conclusion of the Circuit Court of Appeals that the transfer was "made in contemplation of death within the meaning of the pertinent section of the Revenue Act." (R. 71.) It is clear that the court understood the principles of the *Goldstone* case to control the result in the instant case. (R. 64.) It was not distinguishing between transfers made in

contemplation of death and those intended to take effect in possession or enjoyment at death. Either conclusion requires imposition of the tax. *United States* v. *Wells,* 283 U. S. 102, 116–117. The settlor's death was the operative fact necessary to a distribution of the corpus. This was, then, an *inter vivos* transfer possessing the indicia of a testamentary disposition. Its inclusion in the taxable gross estate was, therefore, required, and the question whether the *Goldstone* case also supports a conclusion that the transfer was made in contemplation of death seems immaterial.

III

In view of the foregoing, it appears that the validity of the decision below does not depend upon the conclusion of the Circuit Court of Appeals with respect to the indivisible character of the transaction. (R. 71.) However, ample support for the conclusion is found in the facts of the case. The intervention of the trustee was held to be a mere matter of form and of no substantial consequence. (R. 70.) Thus, the case falls clearly within the ambit of the *Goldstone* case and *Helvering* v. *Le Gierse,* 312 U. S. 531.

CONCLUSION

The decision below is correct. No conflict is presented nor is there any sufficient basis for re-

view by this Court. The petition should, therefore, be denied.

Respectfully submitted,

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NOVEMBER, 1945.

APPENDIX

Internal Revenue Code:

> SEC. 811. GROSS ESTATE.
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—
>
> * * * * *
>
> (c) Transfers in Contemplation of, or Taking Effect at Death.—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * * (26 U. S. C. 1940 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

> SEC. 81.17. *Transfers conditioned upon survivorship.*—The statutory phrase, "a

transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer by the decedent prior to his death (other than a bona fide sale for an adequate and full consideration in money or money's worth) whereby and to the extent that the beneficial title to the property transferred (if the transfer was in trust), or the legal title thereto (if the transfer was otherwise than in trust), is not to pass from the decedent to the donee unless the decedent dies before the donee or another person, or its passing is otherwise conditioned upon decedent's death; or, if title passed to the donee, it is to be defeated and the property is to revert to the decedent as his own should he survive the donee or another person, or the reverting of the property to the decedent is conditioned upon some other contingency terminable by his death. In such instances, *it is immaterial whether the decedent's interest arose by implication of law or by the express terms of the instrument of transfer.* Since in such transfers the decedent's death is requisite to a termination of his interest in the property, it is unimportant whether his interest be denominated a reversion or a possibility of reverter, and whether the interest of the donee be contingent or vested subject to be divested, and the tax will apply, unless otherwise provided in the next succeeding paragraph, without regard to the time when the transfer was made, whether before or after the enactment of the Revenue Act of 1916. * * * (Italics supplied.)

U. S. GOVERNMENT PRINTING OFFICE: 1948

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

NO. 506

MAY S. TONKIN and PEOPLES-PITTSBURGH TRUST COMPANY, Executors of the Estate of John B. Tonkin, Petitioners,

v.

THE UNITED STATES, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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SUBJECT INDEX.

TABLE OF CITATIONS.

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v.

THE UNITED STATES, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners respectfully ask for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit to review a decision of that court entered on July 3, 1945 (re-hearing denied August 2, 1945) which reversed a judgment entered by the District Court for the Western District of Pennsylvania in favor of petitioners in the amount of $45,930.95 with interest.

The reversal was prompted by the decision of this court in *Goldstone et al. v. United States of America,* 65 Supreme Ct. 1323, decided June 11, 1945, five days after the instant case had been argued before the Circuit Court of Appeals.

SUMMARY STATEMENT.

On October 24, 1943 the petitioners filed this suit against The United States for a refund in the amount of $45,930.95 which they paid under protest on a claim for deficiency in estate tax.

The petitioner's decedent, John B. Tonkin, had been President of Peoples Natural Gas Company, a subsidiary of the Standard Oil Company of New Jersey. During the 41 years he had been employed he had acquired more than 10,000 shares of stock in the Standard Oil Company of New Jersey. He determined that these holdings were too large and decided to dispose of some of the stock. He did so and purchased five annuity contracts in various insurance companies for which he paid $75,415. (Finding of Fact 10, R. 46 a).

At the same time on December 3, 1936 Tonkin created an *inter vivos* trust by the terms of which he transferred the following assets to the Peoples-Pittsburgh Trust Company as trustee under an irrevocable trust in which he retained no incidents of ownership nor provided for any reverter (R. 5 a, 27 a, 35 a):

(1) 2204 shares of Standard Oil Company stock;

(2) Three policies of life insurance aggregating $36,300 (these policies were taken out many years before by the settlor and were transferred to the trustee without retaining any incidents of ownership);

(3) Six policies of life insurance aggregating $40,000 (the settlor retained control over these policies and the executors included them in his gross estate; they are therefore not involved in this proceeding).

The trust agreement provided that the settlor's wife could, if she wished, instruct the trustee to purchase either ordinary or single premium life insurance policies on the life of the settlor, and if the trustee had insufficient cash to pay the premiums, it could sell other assets in the trust and use the proceeds. (R 30 a)

Shortly after the creation of the trust, the wife of the settlor instructed the trustee to purchase single premium life insurance policies. (R. 40 a). The trustee sold the 2204 shares of Standard Oil Company stock and purchased five single premium policies having a face value of $200,000. The Commissioner (R. 12 a) included in the gross estate of the decedent the following:

(1) $200,042.98, the proceeds of the five single premium policies.

(2) $36,902.52, the proceeds of three life insurance policies irrevocably assigned to the trustee.

(3) $1,840.26, the uninvested cash in the trust at decedent's death.

The tax deficiency was paid under protest.

The suit for refund filed by petitioners was based on the theory that none of the three items were includible in decedent's gross estate, because Tonkin had irrevocably transferred all interest in the trust when it was created in 1936, so that nothing passed at the time of his death in 1940.

The defense of the government was that the trust was

1. A transfer made in contemplation of death, and

2. A transfer intended to take effect in possession or enjoyment at or after death. (This defense applies only to the proceeds of the five single premium policies.)

The Trial Judge found that the trust was not made in contemplation of death. (Conclusion of Law I, R 51 a).

He also held that the annuities purchased by Tonkin were complete transactions in themselves and did not depend upon any action taken by Mrs. Tonkin or by the trustee. (Finding of Fact 13, R 47 a). The court therefore concluded that the proceeds of the five single premium policies were not includible in the decedent's gross estate as a transfer intended to take effect in possession or enjoyment at or after death. (Conclusion of Law II, R 51 a).

The court therefore entered judgment in favor of the petitioners in the amount of $45,930.95 with interest: 56 F. Supp. 817 (1944). The government appealed and the Circuit Court of Appeals reversed. The opinion of the Circuit Court of Appeals was filed July 3, 1945 and is reported in 150 F. (2d) 531; rehearing was denied on August 2, 1945.

BASIS OF JURISDICTION.

Jurisdiction is invoked under Section 240 of the Judicial Code as amended and more particularly because an important question of federal law is involved which has not been, but should be settled by this court.

QUESTIONS PRESENTED.

1. Where a settlor executes a trust by which he irrevocably transfers assets to a trustee and there is no provision whatsoever in the trust agreement for the reversion of the property under any circumstances to the settlor, does a possibility of reverter by operation of law—in the event that all of the beneficiaries die before the settlor—operate to make the transfer one intended to take effect in possession or enjoyment at or after death within the provisions of Section 302(c) of the Revenue Act of 1926 as amended?

2. Where the trial court makes findings that transfers were not made in contemplation of death and those findings are so overwhelmingly supported by the evidence that the government acquiesces in them and limits its appeal to two other grounds, is the question of contemplation of death before the appellate court for review?

3. Where the trial court found that the purchase of annuities by the decedent was an independent and unrelated transaction, and the transfer of stock to a trustee was complete and final, does the fact that the trustee sold the stock and purchased single premium policies with the proceeds make the proceeds of the policies includible in decedent's gross estate as a transfer intended to take effect in possession or enjoyment at or after death under the provisions of Section 302(c)?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1.

The Goldstone case decided by this Honorable Court on June 11, 1945 (65 Supreme Ct. 1323) on which the Circuit Court of Appeals for the Third Circuit relied, has no application to the case at bar.

In the Goldstone case decedent purchased an annuity contract and a single premium policy and transferred all of his interest in both contracts to his wife; but if she died before he did, he provided that those rights were to revert to him. This court said the essential element was the decedent's possession of a reversionary interest at the time of his death, delaying until then the determination of the ultimate possession or enjoyment of the property.

For this reason the court concluded that the proceeds of both contracts were taxable as part of decedent's gross estate.

In the case at bar it is conceded that the settlor retained no reversionary interest in the proceeds of either the annuity contracts or the single premium life insurance policies. The annuities were purchased by Tonkin and were never transferred to anyone. Payments under the annuity contracts ceased upon his death. The trust agreement did not include the annuity contracts. By the trust agreement Tonkin transferred 2204 shares of Standard Oil stock and some other policies of insurance. The Standard Oil stock was sold by the trustee who purchased single premium life insurance policies. The trust agreement does not contain any

provision for the reversion of any of the trust assets to the settlor.

The possibility of reverter on which the government relied was a reverter by operation of law, in the event that all of the beneficiaries named in the trust died before the settlor. This question, whether a possibility of reverter by operation of law makes transfers taxable, was not raised in the trial court and has not been decided by this Court. If the government were to prevail on this issue, every irrevocable trust in which the beneficiaries are mortal would be subject to tax. A possibility of reverter by operation of law is not like the retention by a settlor of a reversionary interest. Indeed it is just the opposite. The settlor has made no provision for a return of the assets to him. He has attached no string or tie in the trust indenture whereby he might pull back the corpus to himself: *Com. v. Kellogg,* 119 F. 2d 54 (C.C.A. 3, 1941). He has done everything humanly possible to separate himself from his assets. In such a case the possibility of reverter arbitrarily attaches despite the settlor's complete termination of his interest: *Lloyd's Estate v. Com.,* 141 F. 2d 758 (C.C.A. 3, 1944).

The Circuit Court's decision that the trust assets were taxable, because of the possibility of reverter by operation of law, should be reviewed by this court; especially as the same court only a few weeks before had carefully distinguished gifts in which the settlor "positively" reserved rights and those where the reverter was "passive": *Eldredge v. Rothensies,* 150 F. 2d 23, decided by the Third Circuit Court of Appeals on June 12, 1945.

In the *Est. of H. I. Pratt, dec'd. v. Com.,* 5 T.C., No. 106, the Tax Court just held (Sept. 28, 1945) that the remote possibility that assets might revert to decedent by operation of law, if all the beneficiaries died before the decedent, did not make the corpus includible in decedent's gross estate.

2.

The lower court found as a fact that the transfers made by Tonkin were not made in contemplation of death. The evidence in support of these findings was so overwhelming that the government abandoned this ground in its appeal to the Circuit Court. Neither side therefore argued the question and it was not presented to the Circuit Court either in the briefs or oral arguments.

The court nevertheless reversed the lower court and found as a fact that the transfers were made in contemplation of death.

This is contrary to the position universally adopted with respect to findings of a trial court. In *Supornick v. Com.*, 150 F. 2d 110 (C.C.A. 8, 1945) the Circuit Court said (page 111):

> "We must look primarily upon the evidence in support of the Tax Court's findings, inferences and conclusions; and, if we find a substantial basis for such findings present in the evidence, 'the process of judicial review is at an end.'"

We think the court erred in considering the question of contemplation of death.

3.

The Circuit Court held that the purchase of annuities by Tonkin and the purchase of single premium life insurance policies by the trustee constituted a single indivisible transaction, and that therefore the transfer of *all* of the assets to the trust was made in contemplation of death.

In the first place, the finding by the District Court that the two transactions were separate and apart was binding on the Circuit Court: *Dobson v. Com.*, 320 U. S. 489 (1943).

Even if the Circuit Court had been justified in reversing this finding, it still would not follow that *all* of the assets in the trust were taxable.

If the purchase of annuities and the purchase of single premium policies constituted an indivisible transaction, the proceeds of the single premium policies might be taxable as a transfer intended to take effect in possession or enjoyment at or after death. But the indivisibility of these transactions has no relation whatever to the three policies of insurance, the proceeds of which amounted to $36,920.52 and the cash in the trust amounting to $1840.26. The Circuit Court has not disposed of these two items under this reasoning.

Coming back to the taxability of the proceeds of the five single premium policies, the conclusion of the Circuit Court could be correct only if it were based upon a finding that Mrs. Tonkin and the trustee were but the tools or alter ego of Tonkin. There is no evidence in the case to justify such a finding. The District Court found that the purchase of annuities by Tonkin was a separate and unrelated transaction from which Tonkin obtained advantages in federal income and state personal property taxes. It made no difference to Tonkin whether or not single premium policies were purchased. Mrs. Tonkin and the trustee were free to do as they liked about the purchase of such policies. The gift to the trustee was complete and final as far as Tonkin was concerned.

On August 18, 1945 the District Court of the United States for the Southern District of Indiana in *Dickson v. Smith* (the opinion is reported in C.C.H. Inheritance, Estate and Gift Tax Service, paragraph 10226, page 8271) had before it precisely the same question as is involved in this case. There the settlor purchased annuities and gave Inland Steel stock to his three children. They in turn sold the stock and purchased single premium life insurance policies on the life of their father. The court held that the transfer of the stock to the children "constituted final, complete and absolute gifts to them and there was no understanding or agreement that the children should be required to use the proceeds of the gift in any specified manner."

The court therefore concluded that the transfers of stock were not made in contemplation of death or to take effect in possession or enjoyment at or after death.

In the case at bar the trial court found that Mrs. Tonkin, in requesting the trustee to purchase single premium policies, and the trustee, in purchasing the single premium policies, were free and independent agents. The court also found that it made no difference to Tonkin whether policies were purchased or not. There is no evidence in the case of any plan or agreement between any of the parties. Under these circumstances we think Judge Gibson in the District Court, who tried the case, correctly decided that the transfer of stock was not made to take effect in possession or enjoyment at or after death.

It is respectfully submitted that this petition for certiorari to review the judgment of the Circuit Court of Appeals for the Third Circuit should be granted.

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